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No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership,

Petitioner,

—vs.—

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

MOTION OF SYLVANIA TECHNICAL SYSTEMS, INCORPORATED FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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MOTION OF SYLVANIA TECHNICAL SYSTEMS, INCORPORATED FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

Sylvania Technical Systems, Inc. ("Sylvania") hereby requests permission to file a brief *amicus curiae* in the above matter. Sylvania is an American corporation which, in June of 1977,

entered into a commercial contract with the Government of Iran to provide equipment and training in California and Iran for Iranian personnel in the management, maintenance and operation of certain electronic systems. Upon assuming power in Iran, the revolutionary government repudiated and terminated the contract with Sylvania, causing Sylvania to suffer damages in the amount of at least $21,040,000. On February 15, 1980, Sylvania filed suit in California Superior Court against the State of Iran and others for breach of contract, for an accounting and for certain declaratory and injunctive relief.

On February 20, 1980, the California Superior Court granted Sylvania an Order of Attachment directed against the property and assets of defendants in the amount of $21,040,000. Sylvania thereafter served writs of attachment on various third parties and thereby attached certain property and assets of defendants as security for any judgment which ultimately might be entered. On June 4, 1980, the action was removed to the United States District Court for the Northern District of California, where it currently is pending.

On January 19, 1981, in effectuating the release of the American hostages from Iran, President Carter entered into a series of agreements with Iran.[1] Under the terms of the agreements, the United States made a sweeping commitment

> to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained

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[1] These agreements included the Declaration of the Government of the Democratic and Popular Government of Algeria ("General Declaration"), the Declaration of the Government of the Democratic and Popular Government of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration"), and the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria ("Undertakings"). Related escrow and technical agreements were signed on January 20, 1981.

> therein, to prohibit further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.
>
> (General Declaration, General Principles, ¶B).

President Carter signed Executive Orders 12276-85 dated January 19, 1981, 46 Fed. Reg. 7913-32 (1981) ("Carter Executive Orders") with a view to implementing the executive agreements with Iran. Certain of the orders purported to "nullify all attachments" of Iranian assets, as called for by the General Declaration, notwithstanding present or future attachment liens or judgment levies against those assets. At the time, several hundred lawsuits against Iranian defendants, of which Sylvania's action was typical, were pending in courts throughout the United States.

On February 24, 1981, President Reagan signed Executive Order 12294, 46 Fed. Reg. 14,111 (1981) ("Reagan Executive Order") which purported to suspend all claims "which may be presented to the Iran-United States Claims Tribunal." Suspension of any claim would terminate if the Tribunal determined that it did not have jurisdiction. Claims are to be "discharged" when the Tribunal either upholds or rejects them "on the merits" and the awards, if any, have been paid. The Reagan Executive Order, however, makes no provision in case of an inadequate award for compensating the private citizens whose claims and attachments have been taken. The applicable arbitration rules, prepared by the United Nations Commission on International Trade Law (UNCITRAL), lack fundamental procedural safeguards assured to litigants in U.S. federal court actions.

Executive Order Nos. 12279 and 12280 order persons holding funds or securities of Iran or its agencies, instrumentalities, or controlled entities, to transfer such property to the Federal Reserve Bank of New York. New regulations under these executive orders require such transfer under pain of criminal penalties prior to July 19, 1981. In addition, Executive Order No. 12281 orders persons holding Iranian property other than funds or

securities to transfer the same as directed by Iran, irrespective of whether the Tribunal subsequently accepts or rejects jurisdiction. Such direction presumably could come from Iran at any time. In addition, these executive orders purport to prohibit United States litigants from acquiring new interests in Iranian property now in the United States. There is therefore a substantial risk that judgments later obtained in the United States, by litigants such as Sylvania, on claims refused by the Tribunal could not be satisfied if the attachments are voided and Iranian assets transferred out of this country.

In arbitrating claims against Iran, it is contemplated that the Tribunal will administer a $1 billion fund. Whenever the fund falls below $500 million, Iran is supposed to replenish it. (General Declaration, ¶7). There is, however, no guarantee that Iran will replenish this fund. It is estimated that claims in the Southern District of New York alone amount to $1.3 billion, representing approximately one third of the $3 to $4 billion outstanding American claims against Iran. There is no assurance as to whether and when arbitral awards will be fully paid by Iran in the light of that nation's past conduct, including its flagrant and persistent flaunting of international law. Finally, the fact that the Executive is attempting to release from attachment $3 to 4 billion in Iranian assets now in the United States, thereby losing any leverage that it may possess in ensuring Iran's compliance with its obligations, emphasizes the acute inadequacy of the arbitral mechanism. Furthermore, certain claims are to be excluded from arbitration by the terms of Article II of the Claims Settlement Declaration, namely, those ". . . arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts".

In contrast to the dubious arbitral remedy afforded most American claimants, the Undertakings assured that Iran's debts to U.S. and foreign banks with syndicated loans were completely satisfied and established a $1.418 billion escrow fund for other bank claims. (Undertakings, ¶2A-B). The banks thereby were also freed from the burden of pursuing their claims in an

uncertain arbitral forum and from the necessity of any further litigation. Clearly there has been disparate treatment between the U.S. and foreign banks on the one hand and Iran's other U.S. creditors on the other hand, amounting to a denial of equal protection.

Various United States Courts of Appeal and District Courts have now issued opinions relating to the propriety of the various Executive Orders, regulations and Presidential actions. On June 11, 1981, this Court granted the Petition for a Writ of Certiorari Before Judgment in the above-captioned matter. Sylvania, like Petitioner, has a civil action pending in United States District Court, in which an order of attachment has been issued. It is virtually certain that Sylvania's action will be directly affected by this Court's decision in the instant case in view of the common questions which are involved. At the same time, it is believed that Sylvania's position differs in certain material respects from that of Petitioner, and that the presentation of Sylvania's position, as set forth herein, will be of assistance to the Court in the resolution of these matters.

The Office of the Solicitor General of the United States and intervenor Bank Markazi Iran have consented to the filing of Sylvania's *amicus curiae* brief, but Petitioner and intervenor the Atomic Energy Organization of the Government of Iran have declined to do so. Permission to file same also has been sought from intervenor Islamic Republic of Iran, but no decision has been reached by it.

For the foregoing reasons, it is respectfully requested that Sylvania be granted leave to file the following brief *amicus curiae*.

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SUMMARY OF ARGUMENT

A decision by this Court as to whether or not the President had authority to enter into the international agreements and to promulgate the executive orders and regulations pursuant thereto at issue in this case does not dispose of this matter. A valid treaty, executive agreement or order or federal regulation, could not, even if so intended, amend or abrogate the protections afforded by the Bill of Rights, specifically plaintiffs' rights to just compensation for property taken and to equal protection in the implementation of the Declarations. It should be noted that the Declarations themselves do not purport to preclude just compensation or equal protection. While the taking of damage claims and attachments for the public purpose of hostage release affected by the Declarations may be an international obligation of the United States, the Court must also respect plaintiffs' rights by assuring them just compensation for the taking and protection equal to that enjoyed by other claimants, namely the U.S. and foreign banks that were fully paid in January.

The wording of the executive orders and regulations does not assure that compensation to be received through arbitration will be "just" and in fact, does not assure that it will bear *any* relation whatever to the true value of the claims. Rather, the orders require only that compensation shall be whatever amount is decreed by the Tribunal, a body which has not yet been convened and which will have few, if any, of the fundamental safeguards guaranteed by the courts of the United States.

Despite the fact the Tribunal is free to award a minute fraction of the true value of any particular damage claim, the present executive orders would terminate the claim as soon as the award was paid. In such case, compensation for the taking of the claim and attachments would be less than "just" and protection less than "equal" to that afforded to those U.S. and foreign banks who were fully paid in January 1981. In order to insure the constitutionality of the actions of the Executive Branch at issue here, this Court must act to preserve claimants' constitutional rights.

ARGUMENT

POINT I

The Executive Branch May Not Take Property Without Assuring Just Compensation And Equal Protection Even In Carrying Out An International Agreement

A. Implementation of the Executive Orders Without Further Protection for Plaintiffs Would Violate the Fifth Amendment Right to Just Compensation.

Although the Executive has broad power in the area of foreign affairs, such power is not unlimited. "Of course, like every other governmental power, [it] must be exercised in subordination to the applicable provisions of the Constitution." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). More specifically, the President's power to negotiate executive agreements, including claims settlements, is in no way exempt from this fundamental principle. *See Reid v. Covert*, 354 U.S. 1, 16-18 (1957); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

The Fifth Amendment to the U.S. Constitution assures that private property may not be "taken" without due process and then only for a public purpose and upon payment of "just compensation". Plaintiffs' claims against the Iranian government defendants, for which they seek to recover damages, constitute property entitled to the protection of the Fifth Amendment due process and eminent domain clauses. *See, e.g., Lynch v. United States*, 292 U.S. 571 (1934) (Brandeis, J.); *National Airmotive Corp. v. Iran*, 499 F.Supp. 401, 407 (D.D.C. 1980); *Seery v. United States*, 127 F.Supp. 601 (Ct. Cl. 1955); *Gray v. United States*, 21 Ct. Cl. 340 (1886). The crucial fact is that these plaintiffs, including Petitioner and Sylvania, and not the United States, are the owners of the present lawsuits. On the other hand, the United States Government has argued and the First Circuit and District of Columbia Circuit Courts of Appeal have agreed that the United States has settled all claims against Iran and that these claims no longer have any legal effect in United

States courts. *Chas T. Main Int'l Inc. v. Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir., decided May 22, 1981). *American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779 (D.C. Cir., decided May 22, 1981) (opinion filed June 5, 1981). The liquidated value of each lawsuit at present is unknown, just as the value of the compensation to be provided by arbitration is unknown. That which must now be provided is a mechanism for or assurance that the latter value will equal the former.

Moreover, the attachment orders obtained by plaintiffs also constitute a property right[2] which must be accorded protection. *See e.g., Armstrong v. United States*, 364 U.S. 40, 44 (1960); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *National Airmotive Corp. v. Iran, supra*, 499 F.Supp. at 407. *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 49 U.S.L.W. 4033 (Dec. 9, 1980). The implementation of the executive orders and the Treasury regulations aimed at invalidating the attachment orders and effectively eliminating access to the courts would constitute a taking of property since just compensation has not been assured and thus would directly violate the Fifth Amendment.[3] The Government's argument, as set forth in the Memorandum for the Respondents at 11 and asserted throughout these litigations, that revoking the license to attach simply revokes the attachments as well, is tantamount

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[2] *See generally Martinez v. Fox Valley Bus Lines*, 17 F.Supp. 576 (N.D. Ill. 1936); *Gregory v. Colvin*, 235 Ark. 1007, 363 S.W.2d 539 (1963); *North Am. Factors Corp. v. Motty Ettingon, Inc.*, 105 N.Y.S.2d 250 (Sup. Ct.), *aff'd*, 279 App. Div. 719, 108 N.Y.S.2d 338 (1951), *aff'd*, 304 N.Y. 901, 110 N.E.2d 733 (1953); *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372 (1944).

[3] In *Swift & Co. Packers v. Compania Columbiana Del Caribe*, 339 U.S. 684, 697-98 (1950), Justice Frankfurter observed that it was improper to relegate an American plaintiff to a foreign tribunal without assuring that the foreign defendant would provide security equal to that which had been obtained by attachment in American courts. The Tribunal is to administer a $1 billion fund, which represents approximately one third of the $3 to $4 billion outstanding claims against Iran. Clearly the standards envisaged by Justice Frankfurter are not being met in terms of security to satisfy an award, not to mention the serious procedural deficiences in the UNCITRAL Arbitration Rules, United Nations Publication Sales No.: E.77.V.6 (1977), as compared with civil procedures (including discovery) in U.S. District Courts. *See* n.4 *infra* at 11.

to revoking a license to cut trees on government land and then demanding the return of trees validly cut under the license. *Orvis v. Brownell*, 345 U.S. 183 (1953) is not to the contrary, for the reasons set forth by Judge Duffy in *Marschalk Company, Inc. v. Iran National Airlines Corp., et ano.*, 79 Civ. 7035 (S.D.N.Y., decided June 11, 1981) ("*Marschalk v. Iran*") at 70-2, which answer the points made by the First Circuit in *Chas. T. Main, supra*, at 10-12.

The Claims Settlement Declaration, Art. I, provides that plaintiffs not barred by Iranian forum selection clauses may either settle their disputes or seek arbitration. The arbitration mechanism provides that a one billion dollar fund to satisfy claims be established to be replenished by Iran whenever the fund falls below $500 million. (General Declaration, §7). There is no guarantee that Iran will meet this obligation. In view of the fact that the Treasury regulations attempt to dissolve the attachments and to order the transfer of $3 to $4 billion in attached Iranian assets in this country, it is highly unlikely that the United States will retain any substantial leverage to insure that Iran satisfies its obligation to replenish the fund.

The possibility of plaintiffs obtaining just compensation for their claims through arbitration must be considered even more tenuous in light of the cryptic clause employed in defining the jurisdiction of the International Arbitral Tribunal. Article II of the Claims Settlement Declaration excludes from arbitration "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position." While the Reagan Executive Order permits a plaintiff's United States court action to be reactivated upon a determination by the Tribunal that it lacks jurisdiction, it does not restore to the U.S. courts the attached assets that make the action valuable. Without the attachment, there is no reason to believe that a favorable judgment could be enforced, since the Iranian assets would have been transferred out of this country. Plaintiffs understand that the proposed transfer of assets is part of the hostage release package, but do not intend to pay more than U.S. citizens generally for the

hostages' return by accepting less than just compensation for their property.

No assurance is given by the Reagan Executive Order of just compensation in case an arbitration award is clearly in an amount less than the value of the claim. However outrageously low an award, once it is paid the claimant is finally barred from U.S. courts.

It is clear that the Executive's action in voiding the court attachment orders, suspending judicial proceedings, relegating claimants to a highly uncertain arbitration tribunal[4] and using the attached assets to settle the United States' differences with Iran constitutes a taking of plaintiffs' property such as to require compensation. *Behring International, Inc. v. Miller,* 504 F. Supp. 552, 558 (D.N.J. 1980) ("Even if said funds were ultimately utilized by the government in obtaining the release of the hostages, this court can envision no circumstances under which the plaintiff would not be entitled to compensation from the government."); *New England Merchants Bank v. Iran Power Generation and Transmission Co.,*, 508 F.Supp. 49, 51 (S.D.N.Y. 1980) ("Although these rights may not now be fixed and certain, they still are rights in property. As a result, the cancellation of these rights by the executive department may only be accomplished by due process of law." (footnote omitted); *see National Airmotive Corp. v. Iran, supra,* 499 F.Supp. at 406 n.10 ("Finally, the United States always retains the option of spending tax funds in pursuit of its foreign policy objectives, as distin-

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[4] The structure and procedures of the International Arbitral Tribunal fall far short of the minimal guarantees of due process provided in the United States Constitution. The Tribunal probably will be composed of a number of separate panels, each of which will hear the claims against Iran. Each panel will be composed of one Iranian designee, one American designee and one member chosen by agreement between the two sides. The Tribunal thus fails to guarantee an impartial decision maker as envisioned by the Constitution. *See* U.S. Const. art. III, §1.

Moreover, the Tribunal, which is to conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), (a) is not obliged to permit cross examination; (b) may apply whatever rules of evidence it sees fit; (c) must function *in camera* despite the objection of one party; (d) does not provide discovery of right; and (e) does not provide a right of appeal. *See* UNCITRAL Arbitration Rules, *supra.*

guished from private funds or claims to private funds where its authority is much more limited."). *See Armstrong v. United States, supra,* 364 U.S. at 49 (government's destruction of value of lien held to be a "taking").

Constitutional protections are not vitiated merely by the involvement of a foreign state or the existence of an intergovernmental executive agreement. *See, e.g., Seery v. United States, supra,* 127 F.Supp. at 606 (plaintiff's right to sue in United States courts not extinguished by executive agreement with Austria); *Gray v. United States, supra,* 21 Ct. Cl. at 393 (United States Government's cancellation of claims against France considered "the taking of private property for public use without just compensation"). While it is not disputed here that the Executive has the power to settle such claims, it may not exercise that power without insuring constitutionally adequate compensation.[5]

There is no legal precedent for the Government's contention in the various federal court actions that the Executive's general control over the disposition of foreign claims immunizes the Government from liability for a Fifth Amendment taking. All of the cases in which a claimant was denied compensation arose out of situations far different from the one confronting this Court. Thus, in *Gray v. United States,* 21 Ct. Cl. 340 (1886), one

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[5] "Nothing in the Constitution suggests that the rights of individuals in respect of foreign affairs are different from what they are in relation to other exercises of governmental power." L. Henkin, *Foreign Affairs and the Constitution* 252 (1972). This observation has been borne out by case law. The teaching of *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 320 (1936), is only that the Executive is less limited by the necessity of Congressional authorization in the foreign relations area; it is never free from the strictures of the Constitution. Moreover, the *Curtiss-Wright* Court specifically observed that executive power in foreign affairs is in fact subordinate to other constitutional provisions. 299 U.S. at 320. All treaties are thus subject to the Constitution. *See Reid v. Covert,* 354 U.S. 1, 17 (1957) (plurality opinion), in light of which the following formulation from the Restatement (Second) of the Foreign Relations Law of the United States (1965) §213, comment, seems to be accurate only in the most literal sense:

> A question that has not been definitively settled is whether a settlement by the United States for less than the full value of the claim [against a foreign state] may constitute a taking of property from the injured party that entitles him to compensation under the Fifth Amendment to the Constitution.

of the "French Spoliation Claims Cases," the Court of Claims held that settlement of claims by the United States of its nationals against France for seizure of United States ships in return for France's renunciation of certain claims against the United States for treaty violations created a right to compensation under the Fifth Amendment. The Court of Claims held:

> That any Government has the right to [settle claims of its citizens against a foreign state], as it has the right to refuse war in protection of a wronged citizen, or to take other action, which, at the expense of the individual, is most beneficial to the whole people, is too clear for discussion. Nevertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere be given him.

Id. at 392-93.

The validity of the holding in *Gray* was not undercut by *Aris Gloves, Inc. v. United States*, 420 F.2d 1386 (Ct. Cl. 1970), in which the Court of Claims denied Fifth Amendment compensation to the claimant when its property, located in Germany during World War II, was released to the U.S.S.R. as a result of the Potsdam Agreement. In denying the claim, the Court relied on a prior decision, *Juragua Iron Co. v. United States*, 42 Ct. Cl. 99, 111-12 (1907), which also involved a wartime appropriation of privately owned property. It was there held that property found in enemy territory was considered enemy property, regardless of the owner's nationality. In deciding against the *Aris Gloves* claimant, the Court of Claims distinguished the *Gray* decision, citing its advisory nature and dictum of the Supreme Court in *Blagge v. Balch*, 162 U.S. 439, 457 (1896), that the payments prescribed to be made in *Gray* were not based on any right of the claimants.[6]

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[6] "We think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace and not of right." 162 U.S. at 457. It should be remembered that Congress had passed a special statute authorizing the Court of Claims to hear the French Spoliation Claims Cases but did not authorize entry of final judgment.

Judge Nichols, in his concurring opinion in *Aris Gloves*, thoroughly analyzed the *Gray* case, including those factual elements in it which distinguished it from *Aris Gloves*. As Judge Nichols explained:

> It appears to me that to satisfy the *Gray* court, plaintiff here would have had to show as a minimum (a) that the acts of the USSR in seizing United States owned plants in East Germany as "reparations" were contrary to international law, (b) that the USSR's authorities would sooner or later have acknowledged the fact and paid compensation to the United States owners, and (c) that the United States representatives at Potsdam knowingly surrendered this possibility of compensation in return for concessions by the USSR in unrelated areas. Plaintiff has not even demonstrated proposition (a), still less the others.

420 F.2d at 1396-97.

Judge Nichols thus summarized the requisites for a "taking" compensable under the Fifth Amendment. These requisites essentially are: (a) a valid cause of action; (b) the assurance of eventual compensation; and (c) the Government's compromise or settlement of the cause of action for a purpose (such as release of the hostages) unrelated to the merits of the claim. This analysis is supported by the Restatement (Second) of the Foreign Relations Law of the United States:

> The question whether the United States must pay a national of the United States for waiving, or settling for less than full value, his claim for injury by a foreign state may arise in situations where the government may determine that other factors, such as political considerations, affecting the relations of the United States with the foreign state, call for a settlement less favorable to the United States than it would seek if it were concerned only with the economic considerations arising out of the claim and similar claims of other United States nationals.

Id. at § 213, Reporter's Note.

All three requisites exist in the case before this Court as well as in the many similar cases, including Sylvania's, currently pending in the federal courts. Before the Government's "settlement", plaintiffs had valid commercial causes of action against Iran or its agencies or instrumentalities[7] and all plaintiffs with valid attachments were assured of payment to the extent of those attachments. Finally, the Government clearly entered into the Declarations for numerous reasons wholly unrelated to a settlement of the claims on the merits.[8]

In *United States v. Pink*, 315 U.S. 203 (1942), the Court recognized that the Fifth Amendment was a limitation upon the operation of the Litvinov Assignment, an executive agreement recognizing the Soviet government and permitting the United States to seize assets in the United States nationalized by the Soviet Union and to use them to pay claims of U.S. citizens in preference to claims of foreigners. In the *Pink* case, the Court held that creditors of a Russian corporation, who were not citizens of the United States and whose claims did not arise out of transactions in the United States, could not challenge the Soviet nationalization of assets of its citizens or the Litvinov Assignment itself. *Id.*, at 226-227. The Court specifically found, however, that all claims of United States citizens against the Soviet fund had been satisfied and held that the United States

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[7] Under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§1330, 1602 *et seq.* a foreign state may not claim immunity from suit when, *inter alia*, a foreign state defendant has engaged in commercial activity. 28 U.S.C. §1602, 1605(a)(2). As the District Court for the Southern District of New York observed in *New England Merchants Bank v. Iran Power Generation and Transmission Co.*,, 502 F. Supp. 120, 123 (S.D.N.Y. 1980), *remanded*, Nos. 80-6254-6349 (2d Cir., decided April 9, 1981): "There is no question that the instant actions, bar none, are commercial in nature. Indeed, appellees seek monetary damages for alleged civil wrongs ranging from the nationalization and/or conversion of personal property in Iran to the repudiation and breach of various and sundry executory contracts." *See also id.* at 132. Thus, regardless of whether appellants may claim immunity from prejudgment attachment under the 1955 U.S.-Iran Treaty of Amity, Economic Relations and Consular Rights, 8 U.S.T. 899, T.I.A.S. 3853 (1955), there is no question that they may not claim immunity from suit.

[8] Indeed, the favored teatment received by some U.S. plaintiffs—namely the banks—attests to the relative unimportance the Government placed on notions of equity as applied to individual plaintiffs.

could constitutionally prefer its own citizens over foreign nationals in the settlement of claims. *Id.*, at 228. *See* Dean, *Amending the Treaty Power*, 6 Stan. L. Rev. 589, 605 (1954). There is a clear distinction between a holding that the President constitutionally can give effect to a Soviet decree confiscating property of Soviet citizens without compensation and a holding that the President of the United States can confiscate property of American citizens without compensation. The latter proposition is palpably unconstitutional, and *Pink* does not support it.

Unlike the pre-1976 precedents cited by the Government in its various submissions to the federal courts in which these cases are pending,[9] the pending cases indisputably involve judicially cognizable claims secured by valid prejudgment attachments.[10] Since the passage of the FSIA, the Executive Branch may no longer argue that foreign claims are contingent in nature, subject to unrestricted compromise by the United States in furtherance of its foreign policy objectives. As 28 U.S.C. § 1602 unambiguously provides:

> Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States *in conformity with the principles set forth in this chapter.* (emphasis added).

Sylvania does not argue that the United States is powerless to enter into a settlement of foreign claims held by United States

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[9] Even the most recent settlement cited by the Government, between the United States and the Peoples Republic of China, settled claims that had arisen prior to the FSIA. Comment, *The Blocked Chinese Assets-United States Claims Problem: The Lump Sum Settlement Solution*, 3 Fordham Int'l L.J. 51 (1979-1980).

[10] Many of the cases relied upon by the Government are thus inapposite. For example, the reasoning of *Avramova v. United States*, 354 F. Supp. 420 (S.D.N.Y. 1973), is inapplicable since the *Avramova* court based its reasoning on the fact that adjudication by a claims commission does not create a vested right. Plaintiffs herein do have vested rights in litigating their claims and in security for their claims in their orders of attachment. *See also Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955) (an executive agreement between the United States and Austria could not abrogate the plaintiff's right to just compensation following a governmental taking); *United States v. Guy W. Capps, Inc.*, 204 F. 2d 655, 660 (4th Cir. 1953) (executive agreements may not conflict with prior statute or treaty).

citizens. It only asserts that the implementation of such a compromise requires the United States to provide valid compensation and this Court to exercise its powers to see that this is accomplished. Any *statutory* support for the suspension of claims, if such existed, could not diminish the applicable *constitutional* requirements.

The sole precedent relied upon by the Government for its position that the Executive may abrogate the jurisdiction of the courts by executive agreement is the *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). *Schooner Peggy* is a 180 year-old case decided before the development of constitutional and statutory rights accorded United States citizens today. Moreover, *Schooner Peggy* involved the return of a prize of war pursuant to a treaty with France. This contrasts strongly with the present situation, in which creditors are being deprived of a forum by an executive agreement which attempts to intrude on the power of the judiciary.

The established right of a litigant to obtain and enforce an adjudication from a United States court[11] is supported by the FSIA,[12] which provides a comprehensive procedure for obtaining a judgment against a foreign state. Given the express grant of jurisdiction in the FSIA, this Court should not find an implied abrogation of that grant in a delegation of certain powers to the Executive that do not on their face deal with judicial process. *National Airmotive Corp. v. Iran, supra*, 499 F.Supp. at 405, in which the American plaintiffs' constitutional right of access to

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[11] *Reid v. Covert*, 354 U.S. 1 (1957) (attempt by Executive and Congress to transfer jurisdiction over civilians to military tribunal held unconstitutional); *Ex Partè Milligan*, 71 U.S. (4 Wall.) 2 (1866) (executive attempt to eviscerate civilian's right of recourse to federal civil courts rejected).

[12] Significantly, Congress sought in the FSIA to preclude the intrusion of "diplomatic influences" of the type involved in the Declarations:

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, *thereby reducing the foreign policy implications* of immunity determinations and assuring litigants that these often crucial decisions are made *on purely legal grounds and under procedures that insure due process.*

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7 (1976) (emphasis added). In the instant case, the Executive is basing its actions on the very considerations rejected by Congress.

United States courts has recently been reconfirmed. *See Marschalk v. Iran, supra.* In rejecting the Executive's request for an indefinite stay in a suit against Iran, the court relied on

> the very specific and present right of an American plaintiff to access to the American courts to vindicate its claims to property located on American soil—a right stemming directly from Article III of the Constitution and the Fifth Amendment.

499 F. Supp. at 406. The court added:

> An immobilization of the judicial system through the grant of an indefinite stay . . . would simply add the American system of law and justice to the hostage rolls.

Id. at 406 n.11. Here, the issue is not only the "immobilization" of a proceeding, but also the complete extinguishment of valuable court orders obtained by plaintiffs and the evisceration of the right of access to the courts for an unknown number of claimants.[13]

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[13] Relying on the decision in *Orvis v. Brownell*, 345 U.S. 183 (1953), the government also argues that because the attachments were effected pursuant to a revocable license, they may be validly terminated by the Executive. For the reasons set forth in *Marschalk v. Iran, supra*, at 70-2, the *Orvis* precedent, however, is totally inapplicable here. The Executive's authority in that case depended on the express vesting provision in the old Trading With the Enemy Act of 1917 ("TWEA"), 50 U.S.C. App. §5(b) (1976 & Supp. I 1977), a provision which Congress purposefully deleted from the International Emergency Economic Powers Act of 1977 ("IEEPA"), 50 U.S.C. §1702 Supp. I 1977. In the absence of vesting authority, the result in *Zittman v. McGrath*, 341 U.S. 446 (1951), should control. In *Zittman*, the Supreme Court held that an executive freezing order did not prevent an *unlicensed* attachment from creating rights effective between the attaching creditor and the enemy debtor. Moreover, federal courts have repeatedly acknowledged that Section 5(b) of TWEA (whether the vesting or seizing power) is constitutional only because Congress provided in section 9(a) a method by which United States citizens could recover in a post-seizure hearing their interests in or debts from seized enemy property, or compensation for such taking *Becker Steel Co. of America v. Cummings*, 296 U.S. 74, 79 (1935) (dictum) (Stone, J.); *Central Union Trust Co. v. Garvan*, 254 U.S. 554, 568 (1921) (dictum) (Holmes, J.); *Uebersee-Finanz-Korporation v. Markham*, 158 F.2d 313, 314 (D.C. Cir. 1946), 332 U.S. 480 (1947) (although custodian initially seized entire property, he can retain "only that portion tainted with an enemy interest"); *Standard Oil Co. (New Jersey) v. Markham*, 57 F.Supp. 332, 334 (S.D.N.Y. 1944).

B. Implementation of the Executive Orders as Written Would Violate Equal Protection Rights.

The President's exercise of federal power is limited by the Fifth Amendment's due process clause, which subsumes the principles of equal protection. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976), *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). Equal protection principles are violated when the government treats differently those persons who are similarly situated.

The application of the previously described executive orders would result in a denial of equal protection among the various claimants against Iran. The President's agreements with Iran (a) assured that not only American banks with syndicated loans but *also foreign* members of syndicates, including as few as one U.S. bank, would be fully compensated (100 cents on the dollar on mature *and future* obligations alike) (Undertakings, ¶2) and (b) established a special escrow fund for unresolved bank claims. By contrast, compensation for the other American claimants, is dependent upon the vagaries of arbitration. These claimants have access not to the special escrow fund, but only to an admittedly inadequate $1 billion fund that Iran is supposed to maintain at a $500 million minimum level. Thus, the Claims Settlement Declaration spares banks with syndicated loans the necessity of any further litigation in any forum, at the same time that it invalidates plaintiffs' attachments, effectively prohibits their access to the courts, and requires them to resort to a foreign non-consensual arbitration panel for prosecution of their claims. The exclusion of many or most plaintiffs from arbitration raises the strong possibility that they will receive little or no compensation. *See* Subsection A, *supra*. Unquestionably, this constitutes unequal treatment between these two classes of claimants.[14]

Equal protection principles demand, at a minimum, reasonableness of classification. Where classifications distribute benefits

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[14] Apart from taking private property for public use without just compensation and denying equal protection, the disparate treatment accorded different claimants may also constitute a bill of attainder in violation of Article I, Section 9, of the Constitution. *Nixon v. Administrator of General Services*, 433 U.S. 425, 474 (1977).

and burdens in a manner inconsistent with fundamental rights, equal protection also demands that the classifications be strictly scrutinized and held unconstitutional, absent a compelling governmental justification. The Reagan Executive Order burdens contract claimants in such a manner as to interfere with their fundamental right of access to courts. The Supreme Court considered the fundamental right of equal access to the courts in *Boddie v. Connecticut*, 401 U.S. 371 (1971), and held it unconstitutional to impose a requirement that denies a claimant access to a judicial proceeding where that proceeding is "the only effective means of resolving the dispute at hand." *Id.* at 376.[15] The plaintiffs herein, like the plaintiff in *Boddie*, have no other effective means of resolving their claims. The alternatives are settlement, a highly tenuous possibility (especially in light of the fact that the United States does not have diplomatic relations with Iran), and arbitration by an untested international tribunal under rules which do not provide the fundamental safeguards of U.S. federal courts and which can make awards from a limited fund only to those claimants not excluded. Clearly, access to a United States court that has attached Iranian assets is the "only effective means" for many or most of the contract claimants to resolve their claims satisfactorily.

The denial of plaintiffs' right of access to the courts is subject to the strict scrutiny test, under which a classification is unconstitutional unless the government can show a compelling justification. None, however, has been asserted,[16] and the means chosen were hardly necessary to achieve any foreign policy interest of the United States. While the release of the hostages might be raised as the compelling state interest for the payment of some of the funds to Iran, that compelling interest cannot and

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[15] The Court since has stated that in furtherance of administrative purposes a court may impose limitations in the form of filing fees where a bankruptcy plaintiff "may adjust his debts by negotiated agreement with his creditors." *United States v. Kras*, 409 U.S. 434, 445 (1973).

[16] Without such an assertion of reasons for the suspect classification, a court cannot be satisfied that there exists an "overriding national interest" justifying the discrimination. *De Malherbe v. Int'l. Union of Elevator Constructors*, 476 F. Supp. 649, 667 (N.D. Cal. 1979) (holding employment discrimination violative of Fifth Amendment absent overriding national interest).

need not be stretched to sanction the discriminatory allocation of the balance of those funds by the Executive. Payment of funds to a foreign country does not compel such unequal treatment of U.S. creditors.

In addition, the only government interest that may explain this discrimination not only was not "compelling," but undoubtedly was mere convenience: bank claimants were willing to release assets held by them and were less likely to challenge the legality of the President's actions if their claims were satisfied. The acquiescence of the banks facilitated the transfer of frozen assets, notwithstanding court orders and attachments to the contrary. In effect, the President simply purchased the acquiescence of certain of those in possession of Iranian assets and in the best position otherwise to obstruct release of the hostages. Such a discriminatory application of governmental power is precisely the evil prohibited by the equal protection requirement, as well as the due process clause generally.

Finally, even if the Government's actions in seeking the denial of access to American courts and the nullification of attachments while banks are paid in full were not held to the standard of strict scrutiny, these actions would still be required to meet the basic standard of minimum rationality or reasonableness. If it were not possible to satisfy wholly all claimants with the frozen assets and still effectuate the agreements with Iran, the rational nondiscriminatory choice would have been either a *pro rata* allocation of frozen assets among the various claimants or a governmental guarantee that all would be paid the full value of their claims.

Enforcement of the executive orders now without assurance of equal protection must not be condoned, nor need it be, simply to fulfill U.S. obligations to a foreign government. The existing *international* arrangements can be supplemented by further *internal* provisions, as needed to protect and satisfy the constitutional rights of non-bank claimants.[17]

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[17] For example, the United States Government could provide assurance that all arbitration awards and/or settlements will be fully satisfied and that all awards will equal "just compensation". In addition, the government could substitute its guarantee for any attachment vacated.

POINT II

If The Judicial Branch Gives Effect To The International Agreements, It Must Fulfill Constitutional Requirements By Holding That Plaintiffs Will Have Judicial Redress For Failure Of Arbitral Awards To Provide Just Compensation

The Declarations may well be the "supreme Law of the Land" under Article VI of the Constitution, a proposition neither disputed nor admitted here. If so, this Court is bound to carry out their terms in order to avoid violation by the United States of obligations to Iran, under the international law doctrine *pacta sunt servanda*. At the same time, the Court must observe constitutional requirements even where the Executive Branch may have overlooked them.

It should be the Judiciary, not the Executive, that disposes of plaintiffs' suits and attachments. Article III of the United States Constitution and the congressional grant of jurisdiction in the FSIA provide for judicial power to render attachment orders and adjudicate the related claims. The purported effect of the Executive Orders, however, is to negate the attachment orders and oust the courts of existing jurisdiction. Neither the Executive nor Congress has the authority to nullify prior exercises of judicial power. *Electronic Data Systems Corp. Iran v. Social Security Organization of the Government of Iran*, 508 F. Supp. 1350, 1363 (N.D. Tex.), *cert. denied*, 49 U.S.L.W. 3907 (June 8, 1981) ("*Electronic Data*").

Article III, Section 1, of the United States Constitution states:

> The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Executive action devoid of statutory authority cannot interfere with the exercise of jurisdiction of United States courts, which can be conferred and redefined only by Congress. *Marschalk v. Iran, supra* at 17-57; *Electronic Data Systems Corp. Iran v. Social Security Organization of the Government of Iran, supra,*

508 F. Supp. at 1363; *Palmore v. United States*, 411 U.S. 389, 401 (1973); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845); *see Glidden Co. v. Zdanok*, 370 U.S. 530, 551 (1962); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).

But even if the executive orders are authorized by statute, such an exercise of congressionally delegated authority could not override the court orders at issue. *See Marschalk v. Iran*, *supra* at 17-35; *Electronic Data*, *supra*, 508 F. Supp. at 1364. It has been consistently held that, at least as to pending cases, even Congress may not withdraw jurisdiction from federal courts. *Marschalk v. Iran*, *supra* at 17-35; *Electronic Data*, *supra* at 27-28; *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (unconstitutional infringement upon the judicial power by congressional attempt to interfere with litigants' rights in pending cases), *cited with approval in Glidden*, 370 U.S. at 568.[18] *See Dames & Moore v. Atomic Energy Organization of Iran*, No. CV79-0418 (C.D.Cal. Feb. 18, 1981).

Moreover, Congress may not circumvent the strictures of the Constitution in attempting to withdraw jurisdiction. *Marschalk v. Iran*, *supra* at 57-63; *Electronic Data*, *supra*, 508 F. Supp. at 1363-64. As stated in *Battaglia v. General Motors Corp.* 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948):

> We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process

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[18] *Cf. Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869) (holding congressional action withdrawing jurisdiction constitutional). However, in *McCardle* Congress did not withdraw *all* jurisdiction from lower federal courts but only one avenue of appeal to the Supreme Court. Later decisions have cast doubt on the continued validity of *McCardle*. "There is a serious question whether the *McCardle* case could command a majority view today." *Glidden*, *supra*, 370 U.S. at 605 n.11 (Douglas, J., dissenting).

> of law or to take private property without just compensation.

169 F.2d at 257 (footnote omitted).[19] If Congress, with its constitutional authority over jurisdiction of federal courts,[20] cannot withdraw jurisdiction over pending cases, *a fortiori*, the Executive may not do so.

Basic to the exercise of jurisdiction is the continuing effectiveness of a court order and its immunity from non-judicial interference. In *In re Tyler*, 149 U.S. 164, 182-83 (1893), the Supreme Court held that property in the possession of a receiver who had been appointed by a circuit court was not amenable to seizure and levy under process issued from a state court to enforce a tax collection without consent of the federal circuit court. *See also Converse v. Highway Construction Co. of Ohio*, 107 F.2d 127, 130 (6th Cir. 1939) ("rule [of non-interference with property in the possession of the court without first obtaining the court's consent is] of such importance to the interest and safety of the public and the administration of justice that it should be inflexibly maintained on all occasions"); *In re Rubin*, 242 F.Supp. 408, 412 (E.D. Pa. 1965). The attachment orders in the instant cases have been levied upon, and the Executive may not interfere with the attached assets without the Court's consent. *Marschalk v. Iran, supra* at 64-82.

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[19] *See also Oestereich v. Selective Serv. Bd.*, 393 U.S. 233, 243 n.6 (1968) (Harlan J., concurring); *Crowell v. Benson*, 285 U.S. 22, 56-57 (1932); *Eastern States Petroleum Corp. v. Rogers*, 280 F.2d 611 (D.C. Cir.) *cert. denied*, 364 U.S. 891 (1960); *Government Employees Ins. Company v. LeBleu*, 272 F. Supp. 421, 425 (E.D. La. 1967); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 513, 516 (1974); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1373 (1953).

[20] As previously demonstrated *supra*, plaintiffs have a property interest cognizable under the Fifth Amendment in the attachment orders and the right to access to the courts. Article III mandates that the judiciary shall adjudicate all claims arising under the Constitution: "The judicial Power shall extend to all Cases . . . arising under this Constitution. . . ." U.S. Const. art. III, § 2, cl. 1. Accordingly, even Congress may not intrude upon the "carefully designed contours of Federal Court jurisdiction" where a constitutional claim is involved. *Marschalk v. Iran, supra* at 17-35; *Electronic Data, supra*, 508 F. Supp. at 1364.

Assuming, however, that the terms set forth in the Declarations constitute a valid international agreement, all agencies of the United States, including the Judiciary, should carry out those terms, but only in such a way as to comply with the Constitution. For the reasons given above, the Executive should not attempt to supersede the Judiciary. The latter can be expected to observe, on its own initiative, the international obligations of the United States.

Similarly, the Judiciary must be expected to observe constitutional requirements. Even if for some reason the Declarations had stated that plaintiffs were *not* to be assured just compensation and equal protection in the taking of their claims and attachments for the public purpose of hostage release, the Courts are required nevertheless to assure just compensation and equal protection, since Constitutional rights cannot be taken away by international agreement. *Reid v. Covert, supra.*

However, the *Reid v. Covert* problem of conflict between the Constitution and an international agreement never arises here as there is no conflict between the Declarations and plaintiffs' rights. The Declarations do not say that plaintiffs must *not* receive just compensation and equal protection but that plaintiffs are to be deprived of their claims and attachments as part of the hostage-release package. The Declarations add that some plaintiffs can have access to the untested and questionable remedy of the Tribunal but most certainly do not forbid the United States to fulfill its constitutional duty to see that plaintiffs are fully paid, just as the U.S. and foreign syndicated banks were fully paid. Such full payment must be assured by the Judiciary, since the Executive has simply assumed it without any guarantee.

There is no basis for concluding that Presidents Carter and Reagan intended plaintiffs to get less than their constitutional due, and every reason to conclude the contrary. While the Executive Branch must have believed it was treating plaintiffs fairly in that the Tribunal and Iran would make whole those over whom the Tribunal exercised jurisdiction, unfortunately, it failed to assure that this would occur. Such assurance is all that Sylvania is asking and it is for the Judiciary to provide it.

This Court must assure plaintiffs of judicial redress for any short-fall of future awards. The assurance must occur now, accompanying the present taking of claims and attachments, to preserve the constitutionality of such taking. Contrary to the view of the District of Columbia Circuit that "there is a better time: when and if the United States moves to dismiss the claims in District Court," *American Int'l Group, Inc. v. Islamic Republic of Iran, supra* at 41, any such time would be too late. Once a claim has been accepted by the Tribunal, it will never return to District Court unless any award goes unpaid. The United States need make no such motion to dismiss; a suspension will automatically become a dismissal as soon as the Tribunal holds against claimant or its award, however inadequate, is paid.

The obvious fact that any short-fall in an award as paid is, at present, speculative militates in favor of a present holding that relief under the Tucker Act, 28 U.S.C. §§ 1491 *et seq.*, is available to claimants, including Petitioner and Sylvania. In *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-5 (1974), the Supreme Court repeatedly made clear that there might never be any short-fall below the constitutional level of compensation, but that the parties whose property inevitably would be conveyed to Conrail were held to be entitled to *present* assurance of adequate payment.

> Yet there must be at the time of taking "reasonable certain and adequate provision for obtaining compensation." *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890); see also *Joslin Mfg. Co. v. City of Providence*, 266 U.S. 668, 677 (1923); *United States v. Dow*, 357 U.S. 17, 21 (1958). Therefore we must determine if the Tucker Act is available.

419 U.S. 102, 124-5. The Court found that, as in the present cases, "occurrence of the conveyance allegedly violative of Fifth Amendment rights is in no way hypothetical or speculative". Further, said the Court, "it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Id.* at 143.

Even though the *Regional Rail* parties had stipulated the impossibility of a present determination of even which properties would be transferred, not to mention their value or the value of the consideration to be received, *id.* at 146, the Court held "ripe for adjudication . . . the availability of the Tucker Act remedy *if* the consideration exchanged upon final conveyance of the rail properties is less than the constitutional minimum." *Id.* at 147 (emphasis added).

In short, the Court in *Regional Rail* was holding that any speculation about short-fall in compensation for property inevitably to be conveyed must be eliminated by a present holding of Tucker Act availability.

> We hold . . . that while the conveyance provisions of the Rail Act might raise serious constitutional questions if a Tucker Act suit were precluded, the availability of the Tucker Act guarantees an adequate remedy at law for any taking which *might* occur as a result of the final-conveyance provisions.

Id. at 149 (emphasis added). The hypothetical nature of any "conveyance taking" was underscored when the Court summarized its holding:

> However, we have already held that, because of the *possibility* that the Rail Act will work a taking, there must be assurance of consideration equal to any constitutional shortfall, and that a Tucker Act remedy is available to provide that assurance.

Id. at 155 (emphasis added).

The holding of Tucker Act availability for "conveyance takings" was arrived at by the same reasoning as that which supported its availability for "erosion takings". Congress in the Rail Act had not amended the Tucker Act. Similarly, in the present situation, no party has argued that the President ever purported to interfere with Tucker Act availability for claimants short-changed by the arbitration process.

Not only is there "no better time" to decide that the Tucker Act applies; this is the last chance. If, for any reason, the Tucker Act does not apply, then suspension of claims against Iran would be invalid. Judge Duffy's holding in *Marschalk v. Iran, supra*, regarding 28 U.S.C. §1502 illustrates the point. Judge Duffy concluded that §1502 would bar Tucker Act relief to Iran claimants, with the consequence that the hostage settlement would be invalid even if the President otherwise was acting within his powers. *Marschalk v. Iran, supra* at 82-85. This is an issue that must be confronted now, not at a later time after claimants, having lost their law suits and attachments, and gone to arbitration, are denied full compensation, either by failure of Iran to pay an award or by an outrageously low award. For claimants to be told only then that §1502 barred Tucker Act relief is unthinkable.

The issue under §1502 is simply whether a claim against the United States for unjustly compensated taking of private property in the process of the Iran settlement grows out of or is dependent upon (a) the settlement or (b) the Fifth Amendment. The First Circuit properly held the latter. *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, supra.* In prior cases courts have uniformly held that in order for this section to bar jurisdiction, the claim "must have its origin—derive its life and existence—from some treaty stipulation". *United States v. Weld*, 127 U.S. 51, 57 (1888); *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 904 (Ct.Cl. 1976);[21] see *S.N.T. Fratelli Gondrand v. United States*, 166 Ct.Cl. 473, 478 (1964). Sylvania's claim to just compensation and equal protection derives from the United States Constitution and not from the General Declaration or the Claims Settlement Declaration. The Supreme Court should hold that §1502 does not bar Tucker Act relief to Sylvania and other claimants against Iran.

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[21] In *Hughes Aircraft*, the Court of Claims declared that § 1502 applied only where, "absent certain express terms or provisions [of a treaty or executive agreement], there could be no claim at all." 534 F.2d at 904.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should not permit enforcement of the international agreements, executive orders and regulations at issue, in the absence of adequate assurances to claimants, including Petitioner and Sylvania Technical Systems, Inc., that their constitutional rights to just compensation and equal protection will be fully protected.

Respectfully submitted,

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